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IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. 251

ETHEL ANDERSON, as Administratrix of the Estate of James Lester Anderson, Deceased,

Petitioner,

v.

ATLANTIC COAST LINE RAILROAD COMPANY,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

THOMAS A. LARKINS,
604 Lynch Building,
Jacksonville 2, Florida,

WILLIAM MIZELLE HOWELL,
601 Atlantic National Bank Building,
Jacksonville 2, Florida,

RALPH E. STSTRUNK,
705 Lynch Building,
Jacksonville 2, Florida

Attorneys for Petitioner

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45 U. S. Code,

§51 20

§53 21

§54 21

§56 22

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No. .....

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Petitioner,

v.

ATLANTIC COAST LINE RAILROAD COMPANY,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

Petitioner, Ethel Anderson, as Administratrix of the Estate of James Lester Anderson, deceased, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit rendered and entered in this case on May 21, 1959.

The Opinion Below.

The opinion of the Court of Appeals has not been reported at the date of this petition. A copy of the opinion (R. 726) is appended beginning at page 11.

The District Judge wrote a memorandum (R. 711) which is set out in the appendix, *post*, page 18.

Jurisdiction.

Jurisdiction to issue the writ rests on 28 U. S. Code, §1254(1). This petition presents a claim of right under the Federal Employers' Liability Act, 45 U. S. Code §51.

The judgment of the Court of Appeals was entered on May 21, 1959 (R. 736; it is set out at page 18, *post*). A petition for rehearing, timely filed June 8, 1959 (R. 738) was denied without opinion June 17, 1959 (R. 753).

Question Presented.

Whether a judgment recovered by an injured railroad employee for injuries inflicted by the running of a train should be reversed for the sole reason that the District Judge charged the jury respecting the doctrine of the last clear chance that implied or imputed knowledge, as well as actual knowledge, by defendant of plaintiff's peril would set the doctrine in motion.

Statute Involved.

The statutory provisions involved are sections 51, 53, 54 and 56 of the Federal Employers' Liability Act, *ib.* 45 U. S. Code; 53 Stat. 1404, 35 Stat. 66, and 62 Stat. 989, respectively.

Statement of the Case.

James Lester Anderson, a citizen of Florida, 25 years old, in good physical and mental health (R. 165), employed and engaged by the respondent railroad as a flagman, was so grievously injured when struck by an Atlantic Coast Line

train that forty-two months afterward and during this litigation he died, and for him as a party his administratrix was substituted.

Anderson brought this suit in the District Court for the Southern District of Florida under 45 U. S. Code, Sec. 56.

A jury in the District Court gave Anderson a verdict for $115,000. The District Judge refused to interfere with it (R. 710).

The Court of Appeals held that the case was properly one for the jury. It did not interfere with the amount of the verdict nor criticize the amount. The Court of Appeals reversed the judgment on the ground that the last clear chance doctrine does not come into play unless there is actual discovery by defendant of plaintiff's peril; and, said that (R. 734):

> "It is not enough that the peril might have been discovered by the exercise of reasonable care. The instruction given was erroneous and because of the error we reverse for a new trial".

(This Court rebuked that method of depriving an injured railroad employee of the fruits of a jury verdict in *Affolder* v. *New York C. & St. L. R. Co.*, 339 U. S. 96, 94 L. Ed. 683.) The Court of Appeals said it held as it did because of *St. Louis SW. Ry Co.* v. *Simpson*, 286 U. S. 346, 76 L. Ed. 1152, decided in 1932, which in turn was based on *Woloszynowski* v. *New York Central R. R. Co.*, 254 N. Y. 206, 172 NE 471, decided in 1930 (R. 733). The Court of Appeals consciously refused to follow the conceded weight of authority (R. 732) though every pertinent pronouncement by this Court teaches that every permissible principle should be applied liberally for the benefit of the employee.

The Facts of the Injury.

In the early morning when the weather was clear with night, Anderson had been taken by automobile by respondent's trainmaster to a spot where Anderson was to flag the northbound train that later struck and injured him. The trainmaster had instructed him to place torpedoes on the track, walk north to a point 1500 to 2000 feet down the track and there flag the train. The torpedoes were placed and Anderson went on to that point. He had earlier that night flagged on that same track in the same general area a southbound train, without incident (R. 167). On that occasion another employee of respondent's, with weather conditions substantially the same (R. 469) and the train running about 35 or 40 miles per hour, had seen Anderson's shadow a quarter of a mile away, "right in the middle of the rails"; and on that occasion, within that distance, the engineer stopped in order that Anderson might get aboard (R. 469-471), which he did.

Not only did Anderson place the torpedoes as directed by the trainmaster; he also put down a burning fusee. When the train passed over the torpedoes their explosion was heard nearly a mile away (R. 134), from a point about half a mile north of the spot where Anderson's body was found (R. 138). When they were heard, defendant's trainmaster, located about half a mile north of the point where Anderson's body was found, saw a "red glow", which he took to be Anderson's fusee (R. 144/45). "A flare of red light" was seen a few minutes before the blowing of the train whistle was heard for a long time a long way off (R. 76). The light was recognized as "a fusee on the railroad where they put it on the railroad for the train . . . burning out there" (R. 106). Such a fusee at such a loca-

tion is visible for at least six miles (R. 172). It burns for ten minutes (R. 146). Three or four minutes afterwards the train was heard coming, blowing (R. 107). The railroad's Rule 11 forbade a burning fusee on or near the track of an approaching train to be passed until it had burned out (R. 291). And the railroad's Rule 15 (R. 291) and the Company's operating practice commanded the engineer, when he passed the torpedoes, "to reduce speed and look out for a flagman, or an obstruction ahead" (R. 156). As a matter of fact both engineer and fireman "were looking to be flagged" (R. 52) when the torpedoes exploded. The jury would have been entitled to find that the engineer did not comply with either of those rules. He, dead at the time of the trial, stated to an investigating officer the night of the accident that he had seen Anderson's flares and that north of the flares he had seen a man in the train's light (R. 263).

Anderson was seen by the fireman when the locomotive was within 150-200 feet of him—sitting on the east rail facing west (towards the center of the track) with his arms folded on his knees and his head laying on his arms (R. 38). The locomotive's headlight, burning, enabled the fireman to see "down the track". . . "approximately a quarter of a mile to a half" (R. 34). The track at that point was straight and level for more than twenty miles (R. 29). No whistle was blown nearer than half a mile south of where Anderson was sitting (R. 39), where it was blown for a grade crossing at a time when the speed of the train was about 40 miles per hour (R. 37). The speed was reduced only five miles an hour before Anderson was struck (R. 37) after the emergency brake had been unavailingly applied by the engineer upon the fireman's telling him of Anderson's presence on the track.

The Court of Appeals did not envision the possibility that if the engineer had blown the whistle as soon as the fireman spoke, Anderson, unless he had been stricken helpless with a mortal seizure, could have escaped injury simply by falling or rolling off the track; but decided the case on the narrow concept that "Anderson was not discovered until too late to avoid hitting him" (R. 733).

Reasons for Granting the Writ.

1. The opinion of the Court of Appeals has eroded the proper administration of the Act by a narrow and niggardly construction which this Court disapproved in *Rogers* v. *Mo. P. R. Co.*, 352 U. S. 500, 509, 77 S. Ct. 443, 1 L. Ed. 2d 493, 501. In doing so, the Court of Appeals has decided a Federal question of substance in a way probably not in accord with, indeed in conflict with, applicable decisions of this Court.

2. The petitioner here asserts Federal rights governed by Federal law as to which this Court said, in *Arnold* v. *Panhandle & S. F. R. Co.*, 353 U. S. 360, 361, 77 S. Ct. 1375, 1 L. Ed. 2d 889, 891, the Court will see to it that such rights are fully protected as the Congress intended them to be.

3. Unless the writ be granted, this Court's mandate holding railroads to strict accountability under the Federal Employers' Liability Act will not be honored. *Ringhiser* v. *Chesapeake & O. R. Co.*, 354 U. S. 901, 902, 77 S. Ct. 1093, 1 L. Ed. 2d 1268, 1270, separate opinion. The Court of Appeals has established a new rule of law and one which, under the uniform flow of decisions by this Court involving the Federal Employers' Liability Act, should not be countenanced.

4. The opinion of the Court of Appeals reaches its result by over-exacting requirements for meticulosity, such as this Court brushed aside in *Brown* v. *Western Ry. of Ala.*, 338 U. S. 294, 299, 94 L. Ed. 100, 104.

5. In *Wilkerson* v. *McCarthy*, 336 U. S. 53, 93 L. Ed. 497; in *Owens* v. *Union P. R. Co.*, 319 U. S. 715, 87 L. Ed. 1683; and in *Coray* v. *Southern Pacific Co.*, 335 U. S. 520, 93 L. Ed. 208, the rights of those employees to recover were not denied nor even clouded by the consideration that each of them had the last clear chance to avoid his injury.

6. To the extent that the Court of Appeals' views about the last clear chance are relevant or pertinent, it is apparent that the Court did not consider

(1) That the doctrine is an extension of the principle of proximate cause and that the operation of that principle relegates a plaintiff's contributory negligence to the status of a remote and not efficient cause. The view of the Court of Appeals is not consistent with this Court's holdings in *Fairport P. & E. R. Co.* v. *Meredith*, 292 U. S. 589, 598, 78 L. Ed. 1446; and *Kansas City So. Ry. Co.* v. *Ellzey*, 275 U. S. 236, 240, 72 L. Ed. 259, where the Court said that defendant's excusable unawareness of plaintiff's peril can not arise from carelessness;

(2) That last clear chance is a facet of negligence; and that the holding that only actual knowledge can activate the doctrine is not in accord with the view this Court expressed in *Urie* v. *Thompson*, 337 U. S. 163, 178, 93 L. Ed. 1282, 1297, that a railroad's negligence

> "... within the meaning of the Federal Employers Liability Act, attaches if respondent 'knew, *or by the exercise of due care should have known*' that preva-

lent standards of conduct were inadequate to protect petitioner . . . respondent's knowledge, actual or constructive . . . was a jury question". (Emphasis supplied.)

7. The opinion of the Court of Appeals gives the last clear chance doctrine one significance in general tort law and another and a stricter and narrower concept under the Federal Employers' Liability Act. (In *Kernan* v. *American Dredging Co.*, 355 U. S. 426, 431, 78 S. Ct. 494, 2 L. Ed. 2d 382, this Court disapproved the decision of Jones Act cases "upon their [the District and Circuit Courts'] views of general tort doctrine".) We do not find other authority for such a distinction. This Court, other courts of appeal, and the Fifth Circuit Court of Appeals, applying the doctrine generally, give implied or imputed knowledge the same efficacy as actual knowledge of a defendant's dangerous plight. *Kansas City So. Ry. Co.* v. *Ellzey*, *supra* (275 U. S. 236, 240, 72 L. Ed. 259); *Grand Trunk Ry. Co.* v. *Ives*, 144 U. S. 408, 428, 36 L. Ed. 487, 492.

Some of such holdings by other Circuit Courts are: *Evansville Container Corp.* v. *McDonald*, 6 Cir., 1942, 132 F. 2d 80, 85; *Cobb* v. *Capital Transit Co.*, U. S. App., D. C., 1945, 148 F. 2d 217; *Nielsen* v. *Richman*, 8 Cir., 1940, 114 F. 2d 613; *Theurer* v. *Holland Furnace Co.*, 10 Cir., 1941, 124 F. 2d 494; *Weller* v. *Henry*, 4 Cir., 1950, 181 F. 2d 10; *Churchill* v. *Southern Pac. Co.*, 9 Cir., 1954, 215 F. 2d 657; *Duff* v. *United States*, 4 Cir., 1949, 171 F. 2d 846; *Stinson* v. *Aluminum Co. of America*, 6 Cir., 1944, 141 F. 2d 682; *Friedman* v. *Morris*, 4 Cir., 1954, 209 F. 2d 886; *Schweitzer* v. *Gilmore*, 2 Cir., 1958, 251 F. 2d 171; *Linde Air Products Co.* v. *Cameron*, 4 Cir., 1936, 82 F. 2d 22; *Puerto Rico Ry. Light & Power Co.* v. *Miranda*, 1 Cir., 1932, 62 F. 2d 479.

Some of such cases from the Fifth Circuit are: *Lapuyade* v. *Pacific Employers Ins. Co.*, 5 Cir., 1953, 202 F. 2d 494; *Consumers L. & V. Co.* v. *Atlantic C. L. R. Co.*, 5 Cir., 1941, 117 F. 2d 329, 330; *Allen* v. *Texas & Pac. Ry. Co.*, 5 Cir., 1952, 195 F. 2d 545.

Conclusion.

For the foregoing reasons the case is submitted to this Court as one calling for its supervisory jurisdiction in an important field of Federal law, and as justifying the grant of certiorari we pray for.

Respectfully submitted,

THOMAS A. LARKIN,
604 Lynch Building,
Jacksonville 2, Florida.

WILLIAM MIZELLE HOWELL,
601 Atlantic National Bank Building,
Jacksonville 2, Florida.

RALPH E. SISTRUNK,
705 Lynch Building,
Jacksonville 2, Florida.

Attorneys for Appellee.

Certificate of Service.

I hereby certify that I served this document this 27th day of July, 1959, by depositing a copy of it in a United States mail box with first class postage prepaid, addressed to Kurz & Toole, Esquires, counsel of record, at their post office address.

WILLIAM M. HOWELL,
Of Counsel and Attorney for Appellee.

Opinion of Court of Appeals.

May 21, 1959

(R. 726)

Before HUTCHESON, Chief Judge, and RIVES and JONES, Circuit Judges.

JONES, Circuit Judge: The appellant railroad operated through Chiefland, Florida, where its line of rail lies in a north-south direction. James Lester Anderson was employed by the railroad as a flagman. On the early morning of June 15, 1955, the railroad's train designated as Work Extra No. 225, was engaged in switching cars loaded with watermelons at Chiefland. Anderson was assigned to this train. In the protection of the work train he was directed to flag down a southbound train and a northbound train. He flagged the southbound train at approximately 1:30 A. M. The appellant's trainmaster then took Anderson some distance by automobile to a road crossing south of the work train. The trainmaster instructed Anderson to place torpedoes on the track and then walk north about 1500 to 2000 feet and there flag the northbound train No. 236. Anderson had such signal equipment as was needed. His lantern was lit when he started out. The torpedoes were placed and Anderson went on to the place where the train was to be flagged. There he was struck by the train which he was to flag. He was totally and permanently disabled physically, unable to speak, and incapable of any activity, physical or mental. He sued the appellant by his guardian under the Federal Employers Liability Act, 45 U. S. C. A. §51 et seq. There were three counts of the complaint, each based on different theories of liability. By the first count it was alleged that Anderson was struck by the train while he was in the process of flagging. The second count stated that he was sitting on the track when struck by the train. The third count was based upon the charge that the train was then negligently being operated at a dangerously high rate of speed. In each count it was

asserted that there was negligence in the operation of the train in failing to heed the warning of the torpedoes, in failing to heed the warning of a lantern or fusee signal, and in failing to reduce speed after being warned. The appellant denied any negligence on its part and asserted that the negligence of Anderson was the sole proximate cause of his injuries. The case was tried before court and jury. The appellant's motion for a directed verdict was denied. The jury returned a verdict for the plaintiff in the amount of $115,000. Motions for a judgment notwithstanding the verdict and for a new trial were denied. Judgment was entered on the verdict and from the judgment the appellant has appealed. While the appeal was pending Anderson died. His administratrix has been substituted as a party to the appeal.

The evidence was in conflict as to some of the occurrences after Anderson reached the place where he received his injuries. From testimony for the appellant it appeared that the train was going 40 or 41 miles per hour as it reached the torpedoes. The appellee draws an inference that the train was doing 45 or 46 miles per hour. The evidence of the appellant was that the speed of the train was reduced by about five miles an hour to approximately 35 miles an hour after hitting the torpedoes. The appellant's foreman testified that there was no lighted fusee or lantern showing. The engineer was dead at the time of the trial. For the plaintiff there was testimony of a witness who lived near the track that there was a glow at a time when he heard the train coming and the glow was from a fusee. The trainmaster, after hearing the explosion of the torpedoes, saw a red glow which he took to be Anderson's fusee. The fireman testified that he saw Anderson sitting on a rail of the track when the train was a distance of 150 to 200 feet away. He called to the engineer who applied the emergency brakes but it was impossible to stop in such a distance.

The court instructed the jury as to the rules governing negligence and as to the doctrine of contributory negli-

gence. Among the lengthy instructions was the statutory comparative negligence provision that "The fact that the employee may have been guilty of contributory negligence shall not bar a recovery but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee." 45 U. S. C. A. §53. The court also gave an instruction on the last clear chance doctrine in which, among other things, the jury was told "If you find then that the defendant Railroad had the last clear chance of avoiding injury to James Lester Anderson, notwithstanding the prior or antecedent negligence of Mr. Anderson, he is entitled to recover damages undiminished by any degree of negligence or fault which may have been his because, in law, the one who has the last clear opportunity of avoiding injury is considered solely responsible for it." This was emphasized by the court when the jury, after retiring, returned for further instructions on last clear chance.

Our attention is first directed by the appellant to its contention that the trial court committed error in not granting its motion for a directed verdict on the ground that it did not commit any negligent act which was a contributing cause to Anderson's injury. As the Supreme Court has said:

> "Under this statute the test of a jury case is simply whether the proofs justify with reason the conclusion that employer negligence played any part, even the slightest, in producing the injury or death for which damages are sought. It does not matter that, from the evidence, the jury may also with reason, on grounds of probability, attribute the result to other causes, including the employee's contributory negligence." *Rogers* v. *Missouri Pacific Railroad Co.*, 352 U. S. 500, 524, 559, 77 S. Ct. 443, 459, 478, 1 L. Ed. 2d 493, 515 reh. den. 353 U. S. 943, 77 S. Ct. 808, 1 L. Ed. 2d 764. See *Webb* v. *Illinois Central Railroad Company*, 352 U. S. 512, 521, 77 S. Ct. 451, 459,

1 L. Ed. 2d 503, 515, reh. den. 353 U. S. 943, 77 S. Ct. 809, 1 L. Ed. 2d 764; *Moore* v. *Terminal Railroad Association*, 358 U. S. 31, ... S. Ct. ....., 3 L. Ed. 2d 24.

We do not think it can be said that there was no evidence of negligence of the appellant which might have, in some measure, played a part in producing the injuries to Anderson. The motion for a directed verdict, the motion for a judgment notwithstanding the verdict, and the motion for a new trial on the ground of absence of substantial evidence of negligence on its part were properly overruled.

The appellant asserts that there was prejudicial error in giving the jury the charge on last clear chance. The contention is made that the last clear chance doctrine is inapplicable where the comparative negligence rule has been adopted. It is said, with much logic in the saying, that the last clear chance doctrine casts upon the defendant the entire liability for damage resulting from the fault of both plaintiff and defendant; a liability which, under the comparative negligence rule, should be apportioned in accordance with the degree of fault. See Prosser, Handbook of Torts, 2d Ed. 292; 2 Harper & James, Torts, 1251-1252, N. 26; MacIntyre, Rationale of Last Clear Chance, 53 Harv. L. Rev. 1225, James, Last Clear Chance: A Transitional Doctrine, 47 Yale L. J. 704. The retention of the last clear chance doctrine after the adoption of the comparative negligence rule has been called "absurd". 33 Can. B. Rev. 257. The Florida Supreme Court has recently held that the doctrine of last clear chance does not apply in comparative negligence cases and expressly overruled its earlier decisions holding otherwise. *Loftin* v. *Nolin*, Fla. 86 So. 2d 161, 59 A. L. R. 2d 1257. The Supreme Court of the United States has not, so far as we are aware, expressly ruled upon the applicability of the last clear chance doctrine in an F E L A case. It has considered the doctrine in such cases. See *St. Louis Southwestern Railway Co.* v. *Simpson*, 286 U. S. 346, 52 S. Ct. 520, 76 L. Ed. 1152. Whether

generally applicable or not in comparative negligence cases, we conclude that the last clear chance doctrine has no application in this case.

After stating the last clear chance doctrine in somewhat technical terms, the Court, in its charge, continued:

> "Now, the effect of that rule means simply this: There's a lot of big words in here; I think I'd better try to bring it down a little in focus in a little more, easily understood language. It means that a plaintiff who is negligent in the first instance may recover from a negligent defendant if that negligent defendant had knowledge, or in the exercise of due care should have had knowledge, of the plaintiff's peril, and in fact had opportunity thereafter by the exercise of due care to avoid injury to the plaintiff. In other words, applying it, bringing it down to the facts in this case, if through his own negligence or inattention or for any other reason Mr. Anderson did sit on the track there where he was in a position of peril and he got there by his own fault or negligence, if in the exercise of reasonable care the defendant Railroad Company, or its agents, discovered, or could have discovered, his peril in time to have done something to have avoided injury, then the law says, 'You had the last chance; you had the last clear chance. It was within your power to avoid injuring this man and your negligence is the sole proximate cause.' So that's all that the last clear chance doctrine means. It means that the person having the last clear chance of avoiding an accident is responsible for the accident. If Mr. Anderson was asleep, or sick, or under some sort of a seizure there on the track where he was in a position of peril, and if this train crew saw him there or if by the exercise of reasonable care they should have seen him there and thereafter had time to avoid injuring him, then the Railroad Company is liable under the last clear chance doctrine."

This would render the appellant liable if it could, in the exercise of due care, have discovered the peril in time to have avoided the accident. Such is the rule in some, perhaps a majority, of jurisdictions where the plaintiff was in a position of peril from which he could not extricate himself. 2 Harper & James, Torts, 1248. But in other cases the application of the doctrine is limited to situations where the peril was actually discovered. The evidence that Anderson was not discovered until too late to avoid hitting him is not controverted. The Court of Appeals of New York adopted the view that actual knowledge of the peril was required in order to bring last clear chance into play. That court, speaking through Chief Justice Cardozo, said:

> "The doctrine of the last clear chance, however, is never wakened into action unless and until there is brought home to the defendant to be charged with liability a knowledge that another is in a state of present peril, in which event there must be a reasonable effort to counteract the peril and avert its consequences. Wright *v.* Union Ry. Co., 224 App. Div. 55, 229 N. Y. S. 162; id. 250 N. Y. 526, 166 N. E. 310. Knowledge may be established by circumstantial evidence, in the face even of professions of ignorance (cf. Bragg *v.* Central New England Ry. Co., 228 N. Y. 54, 126 N. E. 253), but knowledge there must be, or negligence so reckless as to betoken indifference to knowledge." *Woloszynowski* v. *New York Central Railroad Co.*, 254 N. Y. 206, 172 N. E. 471.

The Supreme Court of the United States, in an opinion by Mr. Justice Cardozo, approved, cited and followed, in an F E L A case, the principle which had been announced in the New York decision. In the Supreme Court opinion it was stated:

> "We do not need to inquire whether a different conclusion would follow if the conductor in the caboose had discovered that the engineer had gone

upon the main track through a misunderstanding of a later order, and discovering this, had failed after a substantial interval of time to give warning of a peril that he could have easily averted. Nothing of the kind appears. There is an absence of the essential factors that wake into life the doctrine of the last clear chance. In the first place the conductor did not know any more than Simpson did that an order had been violated. He was distrustful of his memory and was looking at the written orders at the moment of the collision. Negligent he may have been, but not recklessly indifferent to a duty to counteract a peril perceived and understood." *St. Louis Southwestern Railway Co.* v. *Simpson, supra.* See *Atchison, T. & S. F. Ry. Co.* v. *Taylor,* 8th Cir. 1912, 196 F. 878; *Iowa Cent. Ry. Co.* v. *Walker,* 8th Cir. 1913, 203 F. 685, cert. den. 231 U. S. 746, 34 S. Ct. 319, 58 L. Ed. 464.

In an F E L A case there must be a discovery of the peril before last clear chance comes into play. It is not enough that the peril might have been discovered by the exercise of reasonable care. The instruction given was erroneous and because of the error we reverse for a new trial.

The appellant urges a reversal on the ground that the verdict and judgment for $115,000 are excessive to such an extent as to require a reversal. In a memorandum the district court stated that if the jury was incorrectly permitted to consider the last clear chance doctrine it would be disposed to enter a remittitur of $35,000. Of course, and this the district court recognized, the apportionment of damages under the comparative negligence rule is for the jury subject to review if excessive as a matter of law. As there is to be a new trial it becomes unnecessary to consider further the size of the verdict.

In order that there may be a new trial the judgment of the district court is

Reversed and Remanded.

Judgment.

Extract from the Minutes of May 21, 1959.

(R. 736)

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Florida, and was argued by counsel;

On Consideration Whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, reversed; and that this cause be, and it is hereby, remanded to the said District Court for a new trial;

It is further ordered and adjudged that the appellee, Ethel Anderson, as Administratrix of the Estate of James Lester Anderson, deceased, be condemned to pay the costs of this cause in this Court for which execution may be issued out of the said District Court.

District Judge's Memorandum.

(Relating to Last Clear Chance).

(R. 711, 712)

The defendant vigorously argues the excessiveness of the verdict, asserting that "to allow a railroad employee, in violation of his continuing duty to the company and his fellow employees, who wilfully sits down upon the railroad track, apparently with no concern whatever for his own safety, and is struck by the very train which it is his duty to flag, to recover a verdict of $115,000.00 would be contrary to every American citizen's idea of right and wrong. To allow such recovery for such conduct is contrary to the natural impulses of our society to discourage conduct which has created the risk of harm". I realize that it is my duty

exclusively to determine whether or not the verdict is excessive. While the plaintiff's injuries and damages were such as to justify an even larger verdict to a plaintiff relatively free from fault, nevertheless, if the negligence on plaintiff's part and that on the part of the defendant railroad company can be apportioned, certainly the greater percentage of negligence involved was that of the plaintiff and not of the defendant railroad. The size of this verdict can be justified only if the Court was correct in instructing the jury upon the doctrine of "last clear chance", and the jury correctly applied the doctrine to the facts in this case and reached the conclusion that plaintiff's negligence was an antecedent cause, and that the negligence of the railroad company was the sole proximate cause of plaintiff's injuries.

If the jury was incorrectly permitted to consider the doctrine of "last clear chance", and if the case should have been submitted on the theory of comparative negligence alone (with "last clear chance" left out) I would be disposed to enter a remittitur requiring plaintiff to reduce the verdict to $35,000.00. I append these observations so that I may not be misunderstood as considering this verdict proper *except* upon a properly submitted theory of "last clear chance".

BRYAN SIMPSON,
United States District Judge.

Jacksonville, Fla.
December 31, 1957

The Federal Employers' Liability Act.

(45 U. S. Code, §51)

Liability of Common Carriers by Railroad, in Interstate or Foreign Commerce, for Injuries to Employees from Negligence; Definition of Employees.

Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter. Apr. 22, 1908, c. 149, §1, 35 Stat. 65; Aug. 11, 1939, c. 685, §1, 53 Stat. 1404.

The Federal Employers' Liability Act.

(45 U. S. Code, Sec. 53)

Contributory Negligence; Diminution of Damages.

In all actions hereafter brought against any such common carrier by railroad under or by virtue of any of the provisions of this chapter to recover damages for personal injuries to an employee, or where such injuries have resulted in his death, the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee: *Provided*, That no such employee who may be injured or killed shall be held to have been guilty of contributory negligence in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee. Apr. 22, 1908, c. 149, Sec. 3, 35 Stat. 66.

(45 U. S. Code, Sec. 54)

Assumption of Risks of Employment.

In any action brought against any common carrier under or by virtue of any of the provisions of this chapter to recover damages for injuries to, or the death of, any of its employees, such employee shall not be held to have assumed the risks of his employment in any case where such injury or death resulted in whole or in part from the negligence of any of the officers, agents or employees of such carrier; and no employee shall be held to have assumed the risks of his employment in any case where the violation by such common carrier of any statute enacted for the safety of

employees contributed to the injury or death of such employee. Apr. 22, 1908, c. 149, Sec. 4, 35 Stat. 66; Aug. 11, 1939, c. 685, Sec. 1, 53 Stat. 1404.

(45 U. S. Code, Sec. 56)

Actions; Limitations; Concurrent Jurisdiction of Courts.

No action shall be maintained under this chapter unless commenced within three years from the day the cause of action accrued.

Under this chapter an action may be brought in a district court of the United States in the district of the residence of the defendant, or in which the cause of action arose, or in which the defendant shall be doing business at the time of commencing such action. The jurisdiction of the courts of the United States under this chapter shall be concurrent with that of the courts of the several States. Apr. 22, 1908, c. 149, Sec. 6, 35 Stat. 66; Apr. 5, 1910, c. 143, Sec. 1, 36 Stat. 291; Mar. 3, 1911, c. 231, Sec. 291, 36 Stat. 1167; Aug. 11, 1939, c. 685, Sec. 2, 53 Stat. 1404; June 25, 1948, c. 646, Sec. 18, 62 Stat. 989.